APPENDIX A

Case No. ___

IN THE
SUPREME COURT OF CALIFORNIA

BENETTA BUELL-WILSON et al.,

Plaintiffs and Respondents

v.

FORD MOTOR COMPANY, et al.

Defendants and Appellants.

After A Decision By The Court of Appeal
Fourth Appellate District, Division 1, Case Nos.
D045154, D045579

San Diego County Superior Court
The Honorable Kevin A. Enright
No. GIC800836

PETITION FOR REVIEW

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ISSUES PRESENTED FOR REVIEW

1. In a product liability design case, is evidence of industry standards and custom, including the product's real-world safety performance relative to comparable products, relevant to the issues of design defect and punitive damages?

2. In a product liability design case, can malice within the meaning of Civil Code section 3294 be deemed established by clear and convincing evidence against a motor vehicle manufacturer where (a) the vehicle complies with applicable federal standards that are required by law to "meet the need for motor vehicle safety," (b) the federal government has rejected the precise standards used by plaintiffs' expert to condemn the product as defective, (c) the vehicle is as safe or safer than comparable vehicles, and (d) there is an objectively reasonable, genuine debate over whether the product is defective?

3. In evaluating punitive damages pursuant to the federal due-process *de novo* review standard, may a court (a) apply the state-law substantial evidence test to presume that the jury made findings it did not expressly make and to disregard objective factors mitigating reprehensibility, and (b) punish the manufacturer's lawful conduct, including its sale of a product to third parties not before the court, even where the manufacturer prevailed in the previous eleven cases involving that same product?

WHY REVIEW SHOULD BE GRANTED

The decision below creates new and draconian rules for product liability cases, including a virtual liability-without-fault standard for punitive damages. Unless reviewed and overturned, that decision will render it irrelevant that a manufacturer's design decisions resulted in a product that complies with industry standards and custom, comports with relevant federal safety standards and reasonable policy judgments, and performs as well or better than comparable competing products. In place of these knowable standards, the decision substitutes a vague regime that will permit tens of millions of dollars of punishments to be imposed if a jury deems a manufacturer's conduct "despicable" on the strength of nothing more than a finding that, as will almost always be the case, the product might possibly have been made "safer" if more money had been spent in making it. That is neither constitutional nor rational. Review is necessary to conform California's product liability and punitive damage law to reason, common sense, and the United States Constitution.

Before this product design trial, eleven Ford Explorer cases involving similar claims had gone to judgment, and in *all eleven* cases judgment was entered in favor of Ford Motor Company (hereafter "Ford"). (Appellant's Appendix 1154-1237 (hereafter "AA").) But in this case, the jury returned split verdicts finding that the Explorer was defective, and that Ford had acted with "malice" in designing it. The jury

awarded an astonishing $368 million in compensatory and punitive damages.

Although the Court of Appeal found that the jury was inflamed by "passion and prejudice" and not acting as a "fair and neutral trier of fact" (*Buell-Wilson v. Ford Motor Company* (August 17, 2006, D045154, D045579) slip opinion, p. 37 (hereafter "slip opn.")), and thus reduced the compensatory and punitive damages to $82.6 million, it otherwise affirmed the judgment. In so doing, the court declared that the jury was empowered to regulate automotive safety – even to the point of overriding the federal agency expressly charged by Congress with this responsibility – "because '[g]overnmental safety standards . . . have failed to provide adequate consumer protection.'" (*Id.*, pp. 49-50.) At the same time, in deciding three important issues of law, the court jettisoned as irrelevant the most reliable and objective information for making decisions about product design and safety.

First, the court held as a matter of law that industry standards and custom – including comparative accident statistics showing that the product was as safe or safer than comparable products – are "irrelevant not only to the issue of defect, but also to punitive damages." (Slip opn., p. 24.) This holding departs from the reasoning of *Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413 (hereafter *Barker*), extends a split among the California courts of appeal, and places California at odds with the majority of other jurisdictions, as well as the Restatement Third of Torts, Product Liability. The court's ruling that it is "reversible error" (slip opn., p. 23) to allow introduction of such data regarding how products comparatively perform in the real world will preclude both plaintiffs and defendants from providing juries with the most crucial information – precisely the kind that actual governmental regulators themselves would rely on – for making decisions about public safety. (See *Daly v. Gen. Motors Corp.* (1978)

20 Cal.3d 725, 746 ["Product designs do not evolve in a vacuum, but must reflect the realities of the market place, kitchen, highway, and shop"]; *Bammerlin v. Navistar Int'l Transp. Corp.* (7th Cir. 1994) 30 F.3d 898, 901 ["Jurors are not engineers, and data on accident rates speak more loudly than abstract arguments"].)

Second, the court held that juries are authorized to deem a manufacturer's design decisions malicious, and impose severe punishment, even where undisputed, objective indicators – such as ongoing genuine debate in the engineering community, accident data showing the product is among the safest in its class, and governmental regulatory decisions confirming the manufacturer's judgment – affirmatively refute malice as a matter of law. This ruling contradicts California law, decisions from other jurisdictions, and due process. This issue is especially important because punitive damages "pose an acute danger of arbitrary deprivation of property." (*State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 417-18 (hereafter *State Farm*).) The danger is heightened in design defect cases, which require jurors to second-guess complex policy judgments, in hindsight, regarding whether a product's utility outweighs its risks, and always in the context of an accident resulting in tragic personal injuries likely to provoke the jury's passion.

Third, the court misinterpreted the due-process excessiveness standards governing punitive damages. These standards require "exacting" *de novo* judicial scrutiny (see *State Farm, supra*, pp. 417-18), but the court conflated *de novo* review with state-law substantial evidence analysis and, as a result, declined to consider key objective factors in upholding a record-setting $55 million punishment. Instead, the court relied on factors condemned by *State Farm*, such as Explorer sales to consumers not before the court, even though Ford had prevailed in the eleven prior Explorer cases.

For these reasons, this Court should grant review.

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II. This Court Should Grant Review To Address The Standards For Imposing Punitive Damages In Product Design Cases Under Section 3294

Civil Code section 3294 permits punitive damages only where it is proven by clear and convincing evidence that the defendant has been guilty of "malice." Section 3294, subdivision (c)(1) defines "malice" as "despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." The "despicable conduct" requirement, which was added in 1987, requires proof of "conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people." (CACI No. 3945; *see also College Hosp., Inc. v. Superior Court (Crowell)* (1994) 8 Cal.4th 704, 725 ["the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible'"]

The Court of Appeal held that punitive damages could be assessed against Ford in this case even though (i) the Explorer complies with applicable federal standards (FMVSS 216 governing roof crush); (ii) the federal government has rejected the precise stability standards used by plaintiffs to condemn the Explorer as defective (the stability index and CU testing); (iii) the Explorer is one of the safest vehicles in its class with respect to rollovers; and (iv) there is an objectively reasonable, genuine debate about whether the Explorer was defective.

Collectively, these facts compel an affirmative finding that Ford's conduct was not despicable. The Court of Appeal, however, relying on *Grimshaw*, which was decided five years before the despicability requirement was added to section 3294, disregarded the federal government's actions and decisions, finding that "'[g]overnmental safety standards and the criminal law have failed to provide adequate consumer protection" and punitive damages therefore "remain as the

most effective remedy for consumer protection." (Slip opn., pp. 49-50.)

The Court of Appeal did not cite any evidence to support this assertion. Moreover, twelve years after *Grimshaw*, in *Ramirez v. Plough* (1993) 6 Cal.4th 539, this Court recognized the deference that should be given to federal standards in tort actions involving "matters that are peculiarly susceptible to legislative and administrative investigation and determination." (*Id.* at p. 553.) *Ramirez* was a product liability action alleging that nonprescription drug manufacturers failed to provide warnings in Spanish. While the Food and Drug Administration (FDA) regulated the labeling of nonprescription drugs, and had studied and encouraged the use of multilingual labeling, it had taken no action to require warnings in any language other than English. (*Id.* at pp. 549-550.) The FDA had "presumably" concluded that "despite the obvious advantages of multilingual package warnings, the associated problems and costs are such that at present warnings should be mandated *only* in English." (*Id.* at p. 552, italics added.) Recognizing that courts "lack[] the procedure and resources to conduct the relevant inquiries" into matters of this nature, this Court "adopt[ed] for tort purposes the existing legislative and administrative standard of care on this issue" and affirmed summary judgment for the drug manufacturers on *compensatory damages*. (*Id.* at pp. 553, 555.)

This Court's deference to the *presumed* decisions of one federal agency in *Ramirez* starkly contrasts with the Court of Appeal's lack of deference to the *actual* decisions of another federal agency. Roof crush and rollover issues present at least as much complexity as issues relating to multilingual warnings. (See, e.g., AA661-671 [64 Fed.Reg. 27343-27353 (May 19, 1999)].) And NHTSA has demonstrated considerable attention and "sensitivity" to rollover and roof crush issues. (See *ibid.*) In fact, while this Court in *Ramirez* had to "presume[]" from the FDA's inaction that it had made a de-

liberate decision not to require multilingual warnings, there is no need to presume or infer anything in this case: NHTSA has *expressly* adopted a safety standard on roof crush, and it has *expressly* rejected both stability index and CU testing as methods for making defect determinations. (See pp. 8-11, *ante.*)

The Court of Appeal also rejected Ford's contention that Ford is not subject to punishment under section 3294 if reasonable people could disagree about whether the Explorer was defective. (Slip opn., p. 46.) But if "despicable" conduct means "conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people" (CACI No. 3945), it follows that the sale of an allegedly defective product cannot be despicable if people could reasonably disagree with the jury's conclusion that the product was defective. Numerous courts have applied some version of this analysis in deciding whether punitive damages are barred in a variety of contexts. (See, e.g., *Satcher v. Honda Motor Co.* (5th Cir 1995) 52 F.3d 1311, 1317 [vacating punitive award where, inter alia, "there is a genuine dispute in the scientific community" regarding reasonableness of design]; *Hillrichs v. Avco Corp.* (Iowa 1994) 514 N.W.2d 94, 100 ["an award of punitive damages is inappropriate when room exists for reasonable disagreement over the relative risks and utilities of the conduct and device at issue"].)

California courts have for years applied this analysis in the insurance bad faith and other areas of the law. (See *Chateau Chamberay Homeowners Assn. v. Associated Int'l Ins. Co.* (2001) 90 Cal.App.4th 335, 348, 351, fn. 10 [when there is a "genuine dispute" over legal and factual issues, evidence will not support punitive damages]; see also *Lusardi Constr. Co. v. Aubry* (1992) 1 Cal.4th 976, 996-997 ["[C]ourts refuse to impose civil penalties against a party who acted with a good faith and reasonable belief in the legality of his or her actions."]; *Kendall Yacht Corp. v. United*

Cal. Bank (1975) 50 Cal.App.3d 949, 958-959 [rejecting claim for punitive damages because it "remains purely speculative as to whether the Bank acted with such malice rather than out of a bona fide disagreement over how far the Bank was required to go in helping the Kendalls with their financial problems"].)[1]

The arguments for such an approach are even more compelling in the product liability context. Professor David Owen, upon whose writings the court in *Grimshaw* so heavily relied, made this precise point more than a quarter of a century ago:

> If [design] decisions fall within any reasonable distance of the 'defect line,' even if in hindsight proven wrong, fairness requires that they ordinarily be judged to have been made in good faith. Stated in another way, even if the product is finally found "defective," the case for punitive damages almost always will be quite weak if a plausible case for nondefectiveness was made the other way. Such damages usually will not be appropriate unless the product was very defective, and plainly so, at the time it was sold. A plaintiff usually should be entitled to a directed verdict on defectiveness, or close thereto, before the punitive damages issue is properly before the jury at all.

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[1] The Court of Appeal dismissed such authority as "cases where there was simply a failure of proof to support a punitive damages award." (Slip opn., pp. 46-47.) But this is wrong, because the proof failed in these cases precisely because the defendant had objectively reasonable grounds for its conduct.

(Owen, *supra*, 49 U.Chi.L.Rev. at pp. 37-38.)

The Court of Appeal interpreted this argument to mean that "punitive damages would never be allowed in cases where the defendant simply had an expert that disagreed with the plaintiff's expert." (Slip opn., p. 46.) But this substantially oversimplifies Ford's argument, Professor Owen's analysis, and the holdings of the cases on which Ford relies. A mere disagreement between *testifying* experts would not necessarily preclude punitive damages, if the jury has a basis for concluding that the defendant's expert's opinion is so lacking in logic and support in the scientific community that there is no arguable justification for the defendant's decisions. On the other hand, if the disagreement between the testifying experts in the courtroom is reflects a serious and significant policy debate in the larger engineering, scientific, and regulatory communities, punitive damages are not a sensible way to resolve that debate. (Cf. *Self, supra*, 42 Cal.App.3d at p. 7 ["prosecution of a lawsuit is a poor way to design a motor vehicle"]; W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?* (2000) 52 Stan.L.Rev. 547, 550-551, 556, 589-590.)

In short, if the issue of product defect is reasonably debatable *and* the conduct of the manufacturer comports with the policy judgment of governmental experts *and* the product is one of the safest in its class, malice cannot be established by clear and convincing evidence.

The Court of Appeal, while not disputing any of these facts, nevertheless found substantial evidence existed to support the jury's punitive damage verdict because "Ford decision makers knew how to make the Explorer less dangerous, but chose not to because of financial considerations." (Slip opn., p. 47.) But this statement conflates a manufacturer's knowledge that a product *can* be made "safer" (which is almost always possible, though perhaps to the detriment of other desirable product attributes, including cost to the con-

sumer) with a manufacturer's "knowledge" that a product *should* be made safer, i.e., that it is "defective." *Barker* holds that "the financial cost of an improved design" is a perfectly legitimate factor to consider in determining whether a product is defective. (20 Cal.3d at p. 431.) Accordingly, a manufacturer's decision not to make a product it believed to be safe even safer for reasons of cost is not even negligent, let alone despicable. (*See Phillips v. Cricket Lighters* (Pa. 2005) 883 A.2d 439, 447 ["We flatly reject [the plaintiff's] assertion that [the defendants'] weighing of financial concerns in determining whether to incorporate additional safety features into its product on a unilateral basis establishes that [the defendants] acted wantonly"].)

This Court has not addressed the liability of product manufacturers for punitive damages since section 3294 was amended in 1987; in fact, this Court has not addressed this issue for almost a quarter century. As a result, the *Grimshaw* decision continues to distort the law in this area. While Ford believes that the Court of Appeal erred in its interpretation of section 3294, the court thoroughly examined the arguments of Ford and the *amicus curiae*, providing this Court with an especially good record for examining these important issues.[2]

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[2] Review is also needed because the Court of Appeal's interpretation of section 3294 renders it unconstitutionally vague as applied in this case, both because Ford did not have notice sufficient to tailor its conduct to avoid punishment and because of the risk of arbitrary and discriminatory enforcement. (See, e.g., *City of Chicago v. Morales* (1999) 527 U.S. 41, 56; *Connally v. General Constr. Co.* (1926) 269 U.S. 385, 391-92; *Southwestern Tel. & Tel. Co. v. Danaher* (1915) 238 U.S. 482, 491; *Hewitt v. State Bd. of Med. Exam'rs* (1906) 148 Cal. 590, 592-593.)

III. This Court Should Grant Review To Clarify The Standards For Scrutinizing Punitive Damages For Excessiveness Under The Due Process Clause In The Product Liability Context

Even as reduced, the $55 million punitive damage award remains the largest single-accident personal injury punitive damage award ever affirmed on appeal in California history. The Court of Appeal's decision upholding this punishment contradicts *State Farm, supra,* 538 U.S. 408, and *BMW of N. Am., Inc. v. Gore* (1996) 517 U.S. 559, and the decisions of this Court and other courts, and it will sow confusion and injustice unless this Court grants review.

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B. Misinterpretation Of The Reprehensibility Guidepost

As a result of its misunderstanding of *de novo* review, the Court of Appeal failed to take into account the multiple objective factors – such as industry standards and custom, federal regulatory decisions, and the genuine debate on these complex design issues – discussed above in Sections I and II, *ante.* Even if these factors do not completely bar punitive damages, they are relevant to gauging the reprehensibility of Ford's conduct. (*BMW*, *supra*, 517 U.S. at pp. 565, 570-571, 577-578 [considering defendant's compliance with statutes in other states in evaluating reprehensibility]; *Clark v. Chrysler Corp.* (6th Cir. 2006) 436 F.3d 594, 602 [cutting $3 million punitive award to approximately $470,000 in design defect wrongful death case where the evidence established at most "a good-faith dispute over whether B-pillar testing is necessary"].)

The Court of Appeal incorrectly found Ford's conduct "more reprehensible" because it was "repeated and not an isolated incident" (slip opn., p. 60), based on the fact that Ford mass-marketed the Explorer as well as the Bronco II.

This ruling contradicts *State Farm*, as well as *Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191, because the court punished Ford for conduct toward third parties not before the court and their "hypothetical claims," "without ever proving the specifics of those 'hypothetical claims.'" (*Id.* at p. 1210, quoting *State Farm*, *supra*, 538 U.S. at p. 423.)

As the record reflects but the Court of Appeal did not mention, Ford *won* the eleven prior trials alleging defects in the Explorer. (AA1154-1237.) By simply assuming that every sale of the Explorer is an example of "repeated" misconduct the court effectively nullified those eleven prior victories (and others since), and inflicted punishment based on conduct exonerated by other juries.[3] The court has also subjected Ford to the threat of duplicative punishment in future cases that rely on the same supposed "repeated" conduct to impose additional punitive damages for marketing the Explorer. (See *Johnson,* 35 Cal.4th at pp. 1209-1210; see also *Williams v. ConAgra Poultry Co.* (8th Cir. 2004) 378 F.3d 790.)

If reprehensibility is properly evaluated, the necessary conclusion is that Ford's conduct was not remotely reprehensible. The proper evaluation of alleged reprehensibility is a recurring and important issue in product liability cases that deserves this Court's attention. At a minimum, this Court should grant and hold this case pending the Supreme Court's decision in *Philip Morris USA v. Williams* (Or. 2005) 127 P.3d 1165 (upholding $79 million punitive award), cert. granted May 30, 2006, No. 05-1256, __ U.S. __ [126 S.Ct. 2329]; cf. *Bullock v. Philip Morris USA, Inc.*, S143850.

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[3] Since the verdict here, Ford has prevailed in the majority of Explorer trials.

APPENDIX B

No. D045154

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

BENETTA BUELL-WILSON and BARRY S. WILSON

Plaintiffs, Respondents, and Cross-Appellants,

v.

FORD MOTOR COMPANY and DREW FORD

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3. The Court Erred In Holding That Industry Standards And Custom Evidence Is Irrelevant To The Jury's Punitive Damages Analysis

The Court incorrectly holds that industry standards and custom evidence is "irrelevant" to the issue of punitive damages, again erroneously relying upon *Grimshaw*. Op. 24, 50. The Court incorrectly finds it insignificant that *Grimshaw* predates the important 1987 amendments to section 3294, which added, among other things, the requirement that a plaintiff prove that a defendant's conduct was "despicable." *Grimshaw*'s version contained no definition of "malice" at all, and provided for the imposition of punitive damages based on an undefined "implied" malice. *See* Op. 50; *see also* Cal.Civ.Code § 3294, amended by Stats. 1987, ch. 1498 § 5; *Grimshaw*, 119 Cal.App.3d at 807-8, 818.

The Explorer's safety record is highly relevant to the objective inquiry into whether Ford's design decisions with regard to the Explorer were "despicable," which is defined as conduct "so vile, base, or contemptible that [they] would be looked down on and despised by reasonable people." CACI 3945; Civ.Code § 3294(c)(1). This standard is one for which evidence of, inter alia, comparative industry data,

standards, and customs is clearly relevant. It was highly prejudicial error to exclude this evidence.

Moreover, such evidence was highly relevant here to the due process issue of the degree of reprehensibility of Ford's conduct. *See State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 418-19; *see* Section I.I., *infra*.

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4. The Court Misapprehends The Nature Of Ford's Challenge To Civil Code Section 3294 On Vagueness Grounds

The Court erroneously rejected Ford's challenge to punitive damages on vagueness grounds, stating that "Ford made just this argument 25 years ago in *Grimshaw, supra,* 119 Cal.App.3d 757. The Court of Appeal rejected it, concluding that 'punitive damages are recoverable in a nondeliberate or unintentional tort where the defendant's conduct constitutes a conscious disregard of the probability of injury to others.'" Op. 54. But the challenge in *Grimshaw* was a *facial* challenges to the statute and punitive damage standards, *i.e.*, an argument that the standards are unconstitutionally vague *in all cases*. *See Grimshaw,* 119 Cal.App.3d at 811 (rejecting challenge to constitutionality of statute on general ground it has been "clear that a manufacturer of a dangerous, defective product might be liable for punitive damages if it knowingly exposed others to the hazard"). Ford's argument here is not that section 3294 is, on its face invalid; Ford agrees that the statute can in fact be constitutionally applied to some fact patterns.

Instead, Ford's vagueness challenge asserts that, while the statute's language might be constitutional as applied to certain kinds of conduct, that same language can be unconstitutionally vague when applied in other contexts, and thus "vagueness challenges . . . must be examined in the light of the facts of the case at hand." *United States v. Mazurie*

(1975) 419 U.S. 544, 550; *see also A.B. Small Co. v. Am. Sugar Ref. Co.* (1925) 267 U.S. 233, 239; *Cranston v. City of Richmond* (1985) 40 Cal.3d 755, 775 (vagueness challenge must be evaluated "in light of the facts of the case at hand") (citing *Mazurie*).

No California decision, including *Grimshaw*, addresses whether Section 3294's punitive damage liability standard, while adequate in some other contexts, is unconstitutionally vague as applied to the design defects alleged in this case. As Ford demonstrated, section 3294, is unconstitutionally vague as applied to the facts here.

Indeed, the Opinion drives home just how vague the punitive damages standard is as applied in this context. The Court holds that manufacturers cannot rely on federal regulations to guide their conduct because "[g]overnmental safety standards . . . have failed to provide adequate consumer protection." (Op. 49-50) They cannot consider industry standards or custom, or even actual data regarding how the product is performing in the real world, because this is "irrelevant not only to the issue of defect, but also to punitive damages." (Op. 24) And they cannot rely on the judgment of their engineers and managers that a product is safe, where other engineers have proposed other design changes. (Op. 46-47). If this is a correct interpretation of California law, then section 3294 is unconstitutionally vague as applied here because Ford has no guidance as to the legality of its conduct. *Cf. A.B. Small*, 267 U.S. at 239-40 (statute unconstitutionally vague because "there was no accepted and fairly stable commercial standard which could be regarded as impliedly taken up and adopted by the statute"); *ACLU v. Board of Education* (1963) 59 Cal.2d 203, 218.

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I. The Court's Ruling That The $55 million Punitive Damage Award Comports With Due Process Is Erroneous And Warrants Rehearing

This Court concluded that the $75 million punitive damage award was "excessive," and reduced it to $55 million. Op. 57. But this is still grossly excessive and unconstitutional. Indeed, it remains the largest single accident personal injury punitive damage award ever affirmed on appeal in California history. This Court should grant rehearing and hold that, as a matter of due process, the punitive damage award should be set aside in its entirety because Ford's conduct was not sufficiently reprehensible to justify an additional sanction over and above the $27.6 million compensatory damage award. *See State Farm*, 538 U.S. at 419 ("[i]t should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should *only* be awarded if the defendant's culpability, after having paid compensatory damages, is *so* reprehensible as to warrant the imposition of *further* sanctions to achieve punishment or deterrence") (emphases added). In the alternative, the Court should further reduce the punitive damage award so that it bears no more than a 1:1 ratio to the compensatory award.

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3. The Court also committed constitutional error in its interpretation of the *State Farm/Gore* reprehensibility guidepost by failing to consider any objective factors bearing on that issue. Applying its erroneous and highly deferential standard of review as to the facts, and referring back to its earlier analysis of the facts under state law, the Court states that the "reprehensibility of Ford's acts was high" (Op. 59-60), but in doing so the Court disregards all of Ford's evidence to the contrary as well as numerous objective factors that must be considered in deciding reprehensibility in the product liability context, including whether (a) there are rea-

sonable, good faith grounds for disagreement regarding the product design issues that form the basis for liability; (b) the product conforms to governmental safety standards or policy decisions; (c) the product conforms to industry standards and custom; and (d) the challenged conduct was part of a good faith effort by the manufacturer to design a lawful product that consumers would find desirable.

These factors are directly relevant to whether Ford's conduct "evinced a reckless disregard for the safety of its customers" (Op. 60) and was "reprehensible" for purposes of the due process analysis.[1] Along with the other portions of the record the Court refused to consider, these factors show Ford acted in good faith in seeking to design a reasonably safe vehicle, refuting both malice and reprehensibility. AOB 40-56; ARB 32-34,36-44, 46-49. There is substantial evidence that Ford management and engineers believed that the Explorer would be an exceedingly safe and stable vehicle, which it was—though the Court excluded Ford's "real world" evidence on that point. Ford's good faith belief that its conduct was lawful was based on, among other things, its compliance with federal safety standards and industry custom, and eliminates, or at the very least mitigates significantly, any reprehensibility. *See BMW of N. Am., Inc. v. Gore* (1996) 517 U.S. 559, 565, 570-71, 577-78 (defendant's reliance on other state statutes authorizing the conduct at issue was reasonable and substantially mitigated reprehensibil-

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[1] The Court states that the purported evidence of such reprehensibility was "primarily adduced through Ford's own internal memoranda and correspondence." Op. 61. The Court omits that such a conclusion could be deduced only from: (1) misleading snippets of those documents, from which the opposite conclusion is drawn if the documents are read as a whole, and (2) a failure to appraise the record as a whole.

ity); *see also Clark v. Chrysler Corp.* (6th Cir. 2006) 436 F.3d 594, 602 (cutting $3 million punitive award to approximately $470,000 in design defect wrongful death case where the evidence established at most "a good-faith dispute over whether B-pillar testing is necessary").

4. This Court erroneously placed undue emphasis on the injuries suffered by Mrs. Wilson as part of the reprehensibility analysis. Op. 59-60. *All* products pose risks that persons will be seriously injured or killed when using the products, *see Corrosion Proof Fittings v. E.P.A.* (5th Cir. 1991) 947 F.2d 1201, 1223 n.23 ("over the next 13 years, we can expect more than a dozen deaths from ingested toothpicks"), so an analysis focusing on whether the manufacturer "knew" of such risks and whether such risks were realized as to the plaintiff provides no meaningful guidance, especially in the context of automobiles, which by their very nature pose significant safety risks.

By placing so much emphasis on the pain suffered by Mrs. Wilson in its reprehensibility analysis (Op. 59) the Court effectively double punished Ford because the large non-economic damage award already addresses Mrs. Wilson's pain and suffering in violation of *State Farm.* 538 U.S. at 426 ("The compensatory damages for the injury suffered here . . . likely were based on a component which was duplicated in the punitive award.

5. The Court incorrectly found Ford's conduct "more reprehensible" because it was "repeated and not an isolated incident." Op. 60. To the extent that the Court is suggesting that Ford's conduct was "repeated" because Ford mass-marketed the Explorer, this ruling violates due process. It flatly violates *State Farm*, as well as *Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191, because the Court is punishing Ford for its conduct as to third parties not before the Court and "hypothetical claims" of those third parties, "without ever proving the specifics of those 'hypothetical claims.'"

Id. at 1210 (quoting *State Farm*, 538 U.S. at 423). Moreover, as the record reflects but this Court does not mention, Ford *won* the 13 prior trials alleging defects in the Explorer. By simply assuming that every sale of the Explorer is an example of "repeated" misconduct this Court has effectively wiped out those thirteen prior victories (and others since), and inflicted punishment based on conduct exonerated by other juries. The Court has also subjected Ford to the threat of duplicative punishment in future cases that rely on the same supposed "repeated" conduct to impose additional punitive damages against Ford for marketing the Explorer. *See Johnson v. Ford*, 35 Cal.4th at 1209-10; *see also Williams v. ConAgra Poultry Co.* (8th Cir. 2004) 378 F.3d 790. This Court's endorsement of the use punitive damages as a regulatory mechanism to augment supposedly inadequate consumer protection efforts by the government, Op. 49-50, suffers from the same due process problems.

To the extent the Court's "repeated misconduct" analysis intended to refer to plaintiffs' claim Ford repeated its purported design errors in the Bronco II when it designed the Explorer, it violates due process for similar reasons. This mode of analysis punishes Ford for its design of the Bronco II, a vehicle that is not at issue in this case, and for conduct as to Bronco II purchasers, third parties not before the Court. This, in turn, eradicates Ford's victories in Bronco II cases, imposes duplicative punishment to the extent Ford has already been subjected to punitive damages in a Bronco II case, and punishes Ford for conduct that is dissimilar from the conduct that harmed the plaintiffs before this Court. *State Farm*, 538 U.S. at 423.

5. The Court's statement that "the jury finding that Ford acted with 'oppression, fraud or malice' demonstrates that Ford's actions were intentional" (Op. 61), is both factually and legally incorrect. Ford did not intend to injure the Wil-

sons and the theory of underlying liability is strict liability—the opposite of an intentional tort.

This Court's analysis, however, conflates an intentional act, a design decision, with an intent to cause harm. Under *State Farm* and *Gore*, the relevant "intent" is an intent to cause injury, not an intent to adopt the challenged design.

6. The Court erroneously stated that Ford's consideration of "financial incentives" makes its conduct reprehensible. Op. 60. As discussed above, it was wholly appropriate, indeed legally required, for Ford to consider financial costs in designing products. *See Phillips*, 883 A.2d 439 at 4457 ("[we] flatly reject [the plaintiff's] assertion that [the defendants'] weighing of financial concerns in determining whether to incorporate additional safety features into its product on a unilateral basis establishes that [the defendants] acted wantonly").

7. The Court also erroneously concludes that the purported reprehensibility of Ford's conduct was high because Ford's "target" was "vulnerable" consumers who "would not understand vehicle design, development and manufacture." Op. 60. The proper inquiry is whether the defendant targeted "*financially* vulnerable" persons—and this factor is intended to be used in financial tort cases, not in a product liability case. *See State Farm*, 538 U.S. at 419. There was no evidence that Ford targeted plaintiffs for this reason, or that plaintiffs were financially vulnerable, or that any financial vulnerability contributed to their injuries. Finally, this analysis improperly punishes Ford for its alleged conduct as to third parties not before the Court—supposed other "vulnerable" consumers—in further violation of due process.

8. The Court also misapplied the ratio of punitive damages to compensatory damages guidepost here. The Court erroneously concludes that a two-to-one ratio is warranted because Ford's reprehensibility is purportedly high. Op. 63. As discussed *supra*, the Court has misapplied the reprehensi-

bility guidepost and is mistaken in this conclusion, and thus there is no basis for a two-to-one ratio here. Moreover, given the enormous and punitive nature of the noneconomic damages award here, even a one-to-one ratio is too high here. *See State Farm*, 538 U.S. 435 ("[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages can reach the outermost limit of the due process guarantee").

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APPENDIX C

No. D045154

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

BENETTA BUELL-WILSON and BARRY S. WILSON

Plaintiffs, Respondents, and Cross-Appellants,

v.

FORD MOTOR COMPANY and DREW FORD

Defendants, Appellants and Cross-Respondents.

On Appeal From The San Diego County Superior Court
The Honorable Kevin A. Enright
No. GIC800836

APPELLANTS' OPENING BRIEF

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INTRODUCTION

The jury awarded the sole occupant in a single-vehicle rollover accident (and her husband) more than ***$368,000,000***. The superior court reduced the award to ***$150,000,000***, but that judgment itself is unlawful, unprecedented, and unconstitutional.

This case involves the 1997 Ford Explorer 4x4, a popular sport utility vehicle. Before this trial, thirteen Explorer cases involving similar claims went to judgment, and in *all thirteen* cases judgment was entered in favor of Ford. Several juries expressly found the Explorer non-defective. In this case, plaintiffs were allowed to focus much of their case, over Ford's continuing objection, on a different, older vehicle: the Ford Bronco II. Bronco II evidence, spanning decades, permeated the trial, and plaintiffs' primary strategy was to blur the distinction between the Explorer and the Bronco II and confuse the jury so that it would impose liability and punishment based on a vehicle that did not injure these plaintiffs and was not at issue in the case.

While admitting extensive irrelevant evidence about the Bronco II, the trial court also excluded highly relevant evi-

dence about the vehicle at issue, the 1997 4-door Explorer. Among other things, plaintiffs were allowed to attack the *Explorer* with the allegedly excessive rollover rate of the *Bronco II* compared to other vehicles, but the court *precluded* Ford from defending the Explorer with its *own* real-world rollover rate compared to other vehicles. This evidence was critical both to distinguish the Explorer from the Bronco II and to show that the Explorer's risk of injury from rollover is not excessive. Evidence of the extent of the risk that plaintiffs' claim is excessive is obviously relevant to the basic liability issue—*i.e.*, whether the risks of the challenged design exceed its utility—as well as central to the punitive damage inquiry. It also would have served to debunk plaintiffs' primary theory that the so-called "static stability index" of a vehicle determines its risk of rollover and that the Explorer was defective simply because its static stability index was similar to that of the Bronco II.

The double-barreled effect of these erroneous evidentiary rulings, which allowed plaintiffs to conduct a full trial of the Bronco II while preventing Ford from defending the Explorer, was highly prejudicial, and violated both California law and due process, as evidenced by the grossly excessive verdict. The jury awarded ***$118,000,000*** in non-economic damages, which was more than five times the amount even plaintiffs contended the evidence supported. The court reduced the compensatory award to $75,000,000, but it remains irrational, punitive, tainted by passion and prejudice, and grossly excessive, especially when compared to the largest awards upheld for similar injuries in other California cases.

In addition to finding the Explorer defective, the jury determined—by the slimmest of margins (9-3)—that the Explorer's design warranted severe *punishment*. But the 1997 Explorer:

- complied with all relevant government safety standards,

- passed all of the handling and stability tests advocated by plaintiffs' own expert,
- passed all of Ford's internal handling and stability tests,
- passed the Consumers Union test, which plaintiffs suggested throughout the trial was the most important of all the tests of stability in "accident avoidance maneuvers" like those involved in this case, and
- has a risk of rollover comparable to other SUVs.

The regulatory agency responsible for automotive safety has consistently rejected plaintiffs' theory that a minimum "static stability index" well above that of the Explorer and other SUVs is necessary for automotive safety. And as noted above, numerous juries presented with the same defect claims have concluded the Explorer is not defective, and some of the jurors in this case agreed.

In short, there indisputably is a sufficient basis for reasonable people, including Ford engineers and managers, to conclude that the Explorer's design was not defective. Plaintiffs presented evidence that, at most, would allow reasonable people to disagree. California law does not allow punitive damages when reasonable people can disagree about the lawfulness of the conduct at issue. Indeed, if California law were interpreted to allow punitive damages in this case, that law would be unconstitutionally vague as applied in violation of the Due Process Clauses of the California and U.S. Constitutions because it failed to provide fair notice of what conduct is punishable and allows arbitrary and discriminatory law enforcement by individual juries.

Yet the jury awarded ***$246,000,000*** in punitive damages, more than twice the amount plaintiffs requested. The court reduced that award to a still record-setting, grossly excessive,

and unconstitutional $75,000,000. The court also allowed the jury to base its punishment on Ford's worldwide wealth and profits in direct violation of this Court's decision in *People v. R.J. Reynolds Tobacco Co.* (2004) 116 Cal.App.4th 1253, 1289.

Accordingly, Ford is entitled to judgment in its favor regarding punitive damages and a new trial as to all other issues.[1] At a minimum, this Court should order a new trial on all issues or a very substantial remittitur.

* * * * *

ARGUMENT

I. Ford Is Entitled To A New Trial Because Of Several Highly Prejudicial, Erroneous Evidentiary Rulings

* * * * *

The superior court abused its discretion with respect to two key evidentiary issues, in violation of California law and due process. The importance of these errors is underscored by the serious due process implications of preventing a defendant facing unprecedented punishment from presenting relevant evidence in its defense (*see People v. Reeder* (1978) 82 Cal.App.3d 543, 552-53) and allowing irrelevant and improper evidence to be used in support of such punishment. *See State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 423.

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[1] A reversal of the judgment also would require a reversal of the post-trial order awarding costs.

A. Admitting Extensive Evidence About The Bronco II Was Erroneous And Prejudicial

The plaintiffs in *all thirteen* previous Explorer cases to go to verdict lost. AA1154-1237.[2] Faced with that record, plaintiffs pulled a bait-and-switch by basing much of their presentation not on the relevant vehicle—the Explorer—but on a *different* vehicle, the Bronco II, which had ceased production by 1990. The decision to allow this irrelevant evidence over Ford's objection was erroneous and prejudicial.

Plaintiffs argued throughout trial that the Explorer was merely a renamed, retooled Bronco II; focused much of their opening and closing arguments on the Bronco II; spent the better part of four days examining witnesses about the Bronco II; and based much of their experts' testimony on the design and stability characteristics of the Bronco II, as well as evidence of some unspecified parts carryover from the Bronco II to the Explorer. *See, e.g.*, RT662:19-690:13, 1255:6-17, 1269:11-1272:17, 1274:26-1275:19, 8169:5-8179:14, 8508:22-24, 8509:8-9; AA2533. They argued the Bronco II had been "singled out . . . among compact utility vehicles" because of its "death record" (RT669:12-17) and elicited testimony from their experts that "data shows the Bronco II to have a higher fatal rollover rate relative to certain competitors," and that its "rollover rate is three times higher than the Chevy S-10 Blazer." *E.g.*, RT1265:1-1266:27; 1247:12-1252:27, 1265:1-1266:27, 1269:11-1270:5, 2847:5-2851:11, 2852:2-15, 2858:13-2879:25, 2890:18-20; AA2111-2476, 2524-2526. Plaintiffs examined witnesses at length about the Bronco II's development

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[2] The superior court refused to allow Ford to present argument about those verdicts to the jury in defense of the punitive damage claim. RT8452:22-8453:5, 8534:26-8537:15; 8516:12-26.

(RT1247:12–1304:17, 2858:13-2945:25, 2970:15-3058:2, 3266:18-3313:18); marketing strategy (RT2982:24-2983:1); litigation, including discovery responses (RT1241:9-12, 2848:24-27); and allegedly missing Bronco II documents from the 1970s and early 1980s. RT2877:19-2878:3.

Plaintiffs' counsel even encouraged the jury to impose punitive damages based on the Bronco II alone: "They go ahead and release the Bronco II in 1983 . . . without recommended track width and [center of gravity] changes, knowing it will roll over and kill and or catastrophically injure many people, which it has. Fraud, oppression, malice, these are issues that relate to the last question on the verdict form . . . the most importance [sic] you will give in this case. And that is yes. Hopefully. . . . [Y]ou learned about the Office of the General Counsel confiscating [Bronco II] stability documents. 53 of those documents are missing. This is the report to the Consumers Union. Bronco II. . . . Quotation in the document. 'We are in deep trouble regarding our rollover rates. Our rollover rate is three times higher than the Chevy S-10 Blazer. We think, however, we have clouded their minds.' . . . Conscious, deliberate, oppressive, fraudulent conduct." RT8172:17-8174:3. *See also* RT2879:7-25, 8172:27-8173:6.

Allowing this irrelevant and inflammatory evidence and argument, particularly to the extent it was allowed here, was highly prejudicial error requiring a new trial.[3] Indeed, plaintiffs' invocation of the Bronco II as a basis for punitive dam-

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[3] Although some incidental references to the Bronco II might have been unavoidable because certain early Explorer design documents referenced the Bronco II as Ford's earlier 2-door SUV, that did not make evidence about the Bronco II relevant to whether the 1997 4-door Explorer is defective.

ages, in and of itself, is unconstitutional and grounds for reversal, because due process forbids imposing punitive damages against a defendant for conduct other than the specific conduct that harmed the plaintiffs before the court. *State Farm*, 538 U.S. at 423.[4]

* * * * *

3. The excluded evidence was highly relevant to rebut plaintiffs' Bronco II evidence and claim for punitive damages.

Plaintiffs were allowed to put on misleading evidence and argued at length to the jury that the *Bronco II*'s supposed "real world" rollover rate told Ford's engineers and "upper management" that their decisions regarding the Explorer were wrong. *E.g.*, RT1265:5-27, 8509:2-7. In both opening statement and closing argument, plaintiffs' counsel emphasized that the Bronco II supposedly had a "fatal rollover rate" that was three times as high as its closest competitors, including the Chevy Blazer. RT663:20-27; 8173:20-25. Plaintiffs claimed that Ford willfully disregarded the "what they knew" based on this comparative "fatal rollover rate." RT8171:4-8174:3.

But the court's rulings precluded Ford from proving that the Explorer's "fatal rollover rate"—which is based on the

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[4] The California Supreme Court's recent decision in *Johnson v. Ford Motor Co.* (2005) -- Cal.4th --, 29 Cal.Rptr.3d 401, confirms that a defendant may not be punished for conduct that did not harm the plaintiff (*see id.* at 413 fn.6), that only conduct similar to that which injured the particular plaintiff is even potentially relevant to the punitive damage analysis (*see id.* at 411), and that "in the context of civil actions courts must ensure the conduct in question *replicates* the prior transgressions." *Id.* (quoting *State Farm*, 538 U.S. at 423-24) (emphasis added).

same government database upon which plaintiffs relied to attack the Bronco II—compared very favorably to that of its closest competitors, and was nearly identical to that of the Blazer. In other words, plaintiffs were allowed to attack the *Explorer* with the "fatal rollover rate" of the *Bronco II* compared to other vehicles, but Ford was precluded from defending the Explorer with its *own* "fatal rollover rate" compared to other vehicles, including the very same vehicles plaintiffs used for comparison. It is difficult to imagine a more irrational, unfair, and prejudicial combination of evidentiary rulings.

Ford's safety record evidence was highly relevant to the punitive damage inquiry, which required the jury to evaluate whether Ford's conduct in choosing the Explorer design was "despicable" and "malicious" under California Civil Code section 3294 and whether Ford "willfully and consciously" disregarded a manifestly unreasonable risk of serious injury.[5] Given that all vehicles pose some degree of risk, including rollover risk, manufacturers must always make design decisions weighing risks and benefits. Indeed, plaintiffs argued that Ford's engineers *should have* considered *more closely* alleged statistical evidence of rollover rates in making their design decisions. RT1265:20-22, 1266:3-5, 1266:15-27.

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[5] In denying Ford's new trial motion, the court overlooked the punitive damages aspect of Ford's argument. *Compare* AA2055 (court's statement that "Ford advocates that evidence of the safety of other SUVs is necessary to show the safety of the Ford Explorer") *with* AA1062-1063 (Ford's argument that excluding this evidence was "highly prejudicial to the jury's evaluation of whether Ford's conduct in choosing the Explorer design was 'despicable' and 'malicious' within the meaning of California Civil Code section 3294").

As discussed above (*supra* Part I.A), even plaintiffs' evidence showed that Ford employees expected the Explorer to be safer than the Bronco II. But Ford was precluded from showing that the Explorer's actual safety record proved those Ford employees right and proved plaintiffs' assertion that the 1997 Explorer was a thinly-disguised Bronco II wrong.

This violated not only California law but the Due Process Clause, as it unjustifiably restricted Ford from defending itself against the threat of unprecedented punishment. *See State Farm*, 538 U.S. at 417-18. Had even *one* more juror voted for Ford, several of the liability and damages verdicts would have been different, and there would be no punitive award. The rulings are a clear and prejudicial abuse of discretion, violate due process, and must be reversed. *See Osborn*, 5 Cal.App.4th at 254-55.

II. As A Matter Of Law, Punitive Damages Cannot Be Imposed In This Case

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As shown below, California law and basic due process principles require that judgment be entered for Ford on punitive damages.

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B. If California Law Would Allow Punishment On This Record, Then The Law Is Unconstitutionally Vague As Applied

If Section 3294 would permit an award of punitive damages against Ford, then that statute is unconstitutionally vague as applied to this case.

As a matter of due process under the California and United States Constitutions, a quasi-criminal law is unconsti-

tutionally vague where either of two conditions is met.[6] "First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." *People v. Castaneda* (2000) 23 Cal.4th 743, 751 (quoting *City of Chicago v. Morales* (1999) 527 U.S. 41, 56); *accord, e.g., Hill v. Colorado* (2000) 530 U.S. 703, 732. "[A] fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *Arthur Andersen LLP v. United States* (2005) 544 U.S.--, 125 S.Ct. 2129, 2134 (citation omitted). *See also State Farm*, 538 U.S. at 417; *Simon v. San Paolo U.S. Holding Co.* (2005) — Cal.4th —, 29 Cal.Rptr.3d 379, 392. Clarity is "particularly appropriate here, where the act underlying" the liability finding—manufacturing an automobile—"is by itself innocuous." *Arthur Andersen*, 125 S.Ct. at 2134. If California law allows punishment under the circumstances here, where reasonable people can and do disagree with the scientific reliability of plaintiffs' theory of defect, it is unconstitutional as applied, under both prongs of the vagueness doctrine.

1. As applied, Section 3294 failed to provide Ford a reasonable opportunity to know what conduct is punishable

"[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned*

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6 Punitive damages are "quasi-criminal" and "operate as 'private fines' intended to punish the defendant and deter future wrongdoing." *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 432.

v. City of Rockford (1972) 408 U.S. 104, 108; *accord Morales*, 527 U.S. at 56 (fair notice principle serves the purpose of "provid[ing] the kind of notice that will enable ordinary people to understand what conduct [a law] prohibits"). States may not enforce a "statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *United States v. Lanier* (1997) 520 U.S. 259, 266; *accord, e.g., Gatto v. County of Sonoma* (2002) 98 Cal.App.4th 744, 773-74 (same). This standard forbids punishment when people of common intelligence can differ on whether that conduct is unlawful.[7]

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[7] *See, e.g., United States v. Capital Traction Co.* (D.C. Cir. 1910) 34 App.D.C. 592; *Connally v. Gen. Constr. Co.* (1926) 269 U.S. 385, 391-95 (endorsing *Capital Traction*); *Southwestern Tel. & Tel. Co. v. Danaher* (1915) 238 U.S. 482, 490-91; *Colautti v. Franklin* (1979) 439 U.S. 379, 395-96; *People v. Mirmirani* (1981) 30 Cal.3d 375; *People v. Barksdale* (1972) 8 Cal.3d 320; *Hewitt v. State Bd. of Med. Exam'rs* (1906) 148 Cal. 590, 592-93 ("Taking a given advertisement by a physician, the members of one board might conclude that it contained 'grossly improbable statements,' while another board might reach an entirely opposite conclusion. One might conclude that the statement while 'improbable' was not 'grossly' so. the advertisement of a physician which one board had determined did not come within the inhibition of the rule according to its judgment, a succeeding board might conclude did."); *People v. North* (2003) 112 Cal.App.4th 621; *see also Lanier*, 520 U.S. 259 (noting qualified immunity test provides same protection as vagueness doctrine); *Anderson v. Creighton* (1987) 483 U.S. 635, 641 (cited in *Lanier*; officer entitled to argue for summary judgment on grounds that "he could, as a matter of law, reasonably have believed that [his conduct] was lawful").

If a manufacturer is subject to punishment for selling a product it has reasonable grounds to conclude is not defective, the only way that any manufacturer can avoid punishment is to cease producing products that might be subject to criticism by other reasonable people with differing views. This, in effect, means that manufacturers can avoid punishment only if they stop selling products, because all products can cause injury and litigation experts can be retained to criticize almost any aspect of a product that results in injury.

This case is a graphic illustration of this point. Other than the federal safety standards with which the Explorer indisputably complied, that is no objective legal measure of how resistant to rollover or roof crush a vehicle must be in order to be deemed "non-defective." Reasonable people can disagree on those issues. In the face of such inherent uncertainty, whether a particular design is defective, much less may subject Ford to punishment, can be known only by the after-the-fact determination of a particular jury. And different juries are likely to reach different conclusions. Such an imprecise standard is so vague that reasonable people "must necessarily guess at its meaning and differ as to its application." *Castaneda*, 23 Cal.4th at 751. If Section 3294 permits an award of punitive damages in this case, it is unconstitutionally vague as applied.

2. As applied, Section 3294 permits arbitrary and discriminatory enforcement

"[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them." *Grayned*, 408 U.S. at 108-09; *see also Giaccio v. Pa.* (1966) 382 U.S. 399, 403-04. That is because "[a] vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Id.*; *see also Morales*, 527 U.S. at 56; *Castaneda*, 23 Cal.4th at 751; *Kolender v. Law-*

son (1983) 461 U.S. 352, 357-58; *Gatto*, 98 Cal.App.4th 744; *People v. Superior Court* (1982) 31 Cal.3d 797; *Hewitt*, 148 Cal. at 594.

The danger of arbitrary and discriminatory enforcement is particularly acute in this case. First, Ford is a large, multinational corporation with neither its headquarters nor its principal place of business in California. "Punitive damages pose an acute danger of arbitrary deprivation of property," and "creat[e] the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences." *Honda Motor Co. v. Oberg* (1994) 512 U.S. 415, 432. Second, in the product liability context the test for determining whether a product is defectively designed is not clear but is instead fraught with ambiguities and uncertainty. The jury must consider "a list of *competing* considerations . . . to evaluate in determining the existence of a design defect" (*Anderson v. Owens-Corning Fiberglas Co.* (1991) 53 Cal.3d 987, 1001 (emphasis added)), and conducts this unguided "balancing" process "*through hindsight*." *Barker*, 20 Cal.3d at 430 (emphasis added). Given the inevitable, and often legitimate, differences of opinion regarding the proper mix of these and other conflicting goods, many product liability cases fall within a range of reasonable disagreement:

> There is therefore a vast defect "no man's land" where a manufacturer has no idea whether it is on the right or wrong side of the law. . . . The very notion of how much design safety is enough, and to a lesser extent how much safety information is enough, involves a morass of conceptual, political and practical issues on which juries, courts, commentators and legislatures strongly disagree.

David G. Owen, *Problems In Assessing Punitive Damages Against Manufacturers Of Defective Products*, 49 U.CHI.L.REV. 1, 37 (1982).

Moreover, while there is no dispute that a risk-utility test is appropriate in many contexts, empirical evidence shows that many jurors are prejudiced against risk-utility balancing. Research shows juries are more likely to inflict punitive damages where a defendant has engaged in such a process during the design of a vehicle. W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 STAN.L.REV. 547, 550-51, 556, 589-90 (2000). But California law, by making risk-utility balancing part of its test for design defect, *requires* a manufacturer to engage in such balancing. *See Barker,* 20 Cal.3d at 432. If California law permits juries to award punitive damages based on their own "personal predilections" concerning risk-utility balancing, then California law is unconstitutionally vague. *Kolender*, 461 U.S. at 358.

III. Ford Is Entitled To A New Trial On All Issues, Or At The Very Least A Substantial Remittitur

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B. The Punitive Damages Award Is Excessive And The Product Of Improper Considerations -

The punitive damage award, even as remitted, violates due process and California law. This Court has an obligation to engage in "exacting" *de novo* review of the size of the punitive award to ensure it comports with due process. *State Farm*, 538 U.S. at 418; *see also Simon v. San Paolo U.S. Holding Co., Inc.* (2005) --Cal.4th--, 29 Cal.Rptr.3d 379, 387-88.

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2. The punitive damages award is excessive under *State Farm* and California law

Even if liability for punitive damages were not otherwise precluded, the ***$75,000,000*** punitive judgment would have to be set aside in its entirety as grossly excessive as a matter of California law and the Due Process Clause of the Fourteenth Amendment. This punishment—which began as an outrageous ***$246,000,000*** punitive damages verdict—further confirms that the jury was motivated by anger, passion, prejudice, and bias. The award here is simply off the charts. It is more than three times larger than the largest punitive damages award ever upheld in California in an automotive products liability case in a published opinion. *See Romo*, 113 Cal.App.4th 738 ($23,723,287 award where accident involved three deaths and three other seriously injured individuals). As of 1997, the year of plaintiffs' vehicle, the largest automobile products liability punitive damages award upheld in a published California decision was $4,000,000, or roughly ***1/19th*** of the punitive damages here. *See Hasson*, 32 Cal.3d 388. A new trial is the only way to cure this defect in the proceedings. *See Sabella*, 70 Cal.2d at 316 n.2; *Wells*, 793 F.2d at 683-84.

If the compensatory damages award is upheld, then the punitive damages award must be set aside because of the large, clearly punitive noneconomic damages award. "[L]arge compensatory damage awards . . . have a strong deterrent and punitive effect in themselves." *Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th at 424 (Brown, J., concurring); *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1106 (same). Heaping punishment on top of punishment by allowing the separate punitive damages award to stand would be excessive and unconstitutional.

Moreover, if the compensatory damages award is reduced, then the punitive award must likewise be reduced to maintain a proper ratio. As the Supreme Court stated in *State*

Farm, where compensatory damages are large (and the Court deemed a $1 million compensatory award large), punitive damages should not exceed the compensatory award. *State Farm*, 538 U.S. at 424-28.

Either way, Ford is entitled to a new trial regarding punitive damages, or at the very least a substantial remittitur.

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APPENDIX D

No. D045154

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

BENETTA BUELL-WILSON and BARRY S. WILSON

Plaintiffs, Respondents, and Cross-Appellants,

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IV. PUNITIVE DAMAGES ARE, AS A MATTER OF LAW, PRECLUDED HERE

A. Punitive Damages Cannot Be Imposed Where Plaintiffs Proved, At Most, The Existence Of A Reasonable Disagreement Regarding The Explorer's Design.

As Ford demonstrated in its opening brief, it is a fundamental principle of California and American jurisprudence that, where a defendant has reasonable grounds for believing its conduct is lawful, it cannot be subjected to punitive damages, even if the evidence is sufficient for purposes of assessing compensatory liability. AOB58-60 (citing cases); *see also, e.g., Southwestern Tel. & Tel. Co. v. Danaher* (1915) 238 U.S. 482, 490 (holding that a $6,300 civil penalty violated due process where defendant had a good faith belief that its conduct was lawful). In response, plaintiffs do not really dispute this principle, but instead fall back on slogans, mischaracterizations and the assertion that there is only one right answer to the complex engineering questions posed to

the jury in this case. RB43-47.[1] But if the record makes one thing clear, it is that these issues have been the subject of genuine and vigorous dispute in the engineering community for decades, with plaintiffs' experts and others on one side of the debates and the federal Safety Administration, Ford and other auto manufacturers on the other.

Regardless of who an individual jury agrees with on these reasonably debatable issues, California law, due process, and common sense prohibit the use of punitive damages to punish Ford for its positions in these debates—indeed, a vital feature of science and engineering is the process of debate and disagreement that leads to technological advancement. *Daubert v. Merrell Dow Pharm., Inc.* (1993) 509 U.S. 579, 596-97 ("open debate is an essential part of . . . scientific analyses. . . . Scientific conclusions are subject to perpetual revision."). To hold otherwise would not only be unfair but it would discourage precisely the kind of free and open discussion that is essential to safety innovation and improvement.

Thus, to decide this issue, Ford is not asking this Court to decide who is correct or to override factual determinations made by the jury, as plaintiffs wrongly suggest. RB44-45. Instead, the issue presented is purely a legal one: were there grounds for reasonable disagreement regarding the lawful-

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[1] As Ford pointed out in its opening brief, it made an offer of proof in the trial court to show that 13 Explorer verdicts were rendered *in favor of Ford* before the jury's verdict here, including some that specifically rejected defect claims like those advanced here. Plaintiffs' professed indignation at Ford's reference to these verdicts (RB24) is especially misplaced in light of *plaintiffs'* heavy reliance on other cases—*none* of which involved the Explorer—that went against Ford. RB9, 20-21, 51.

ness of the conduct at issue in this case? The answer is clearly "Yes," and the punitive damage award therefore must be set aside as a matter of law.

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V. THE PUNITIVE DAMAGE AWARD IS UNCONSTITUTIONALLY EXCESSIVE

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A. The Punitive Damages Award Does Not Comply With Constitutional Guideposts.

Plaintiffs claim the punitive damages award was proper because Ford's conduct was "highly reprehensible" for five reasons: (1) it caused physical, not economic, harm; (2) it evinced an indifference to the safety of others; (3) its target was financially vulnerable; (4) it had a "pattern of deficient design regarding safety in favor of increased financial returns"; and (5) the harm was not accidental. RB53-54.

Plaintiffs ignore the proper standard of review. The United States Supreme Court has held that courts have a special obligation, as a matter of federal due process, to engage in "[e]xacting" *de novo* review of punitive damages awards, *see, e.g.*, *State Farm*, 538 U.S. at 418, which requires courts to, among other things, "mak[e] an independent assessment of the reprehensibility of the defendant's conduct" without deference to any "implied" "findings" by the jury. *Simon v. San Paolo U.S. Holdings, Co., Inc.* (2004) 35 Cal.4th 1159, 1172-73 (due process precludes deference to anything other than jury's *express* factual findings). Not only did the jury here not make specific factual findings on the malice point, but it split 9-3 on punitive liability—underscoring the fact that Ford's conduct was far from the sort of clearly reprehensible behavior that warrants substantial punishment.

The five factors plaintiffs invoke are derived from *State Farm*, but this Court's review must eschew plaintiffs' mechanical application, and instead use these and other factors

to situate the conduct at issue within a rational spectrum of behavior all of which is in some sense "reprehensible" enough to warrant *some* punitive damages. A proper analysis necessarily recognizes that *every* product liability case will involve physical injury and some conduct that can be characterized as "indifference" to safety. Indeed, virtually *all* product manufacturers to some degree must "know" or "expect" that their products will cause injury—even serious injury—but not every product liability case falls at the high end of the spectrum. *See* AOB74, 78-79; *see also, e.g., Corrosion Proof Fittings v. E.P.A.* (5th Cir. 1991) 947 F.2d 1201, 1223 n.23 ("over the next 13 years, we can expect more than a dozen deaths from ingested *toothpicks*") (original emphasis).

Thus, plaintiffs' first factor is not determinative here because product liability cases always involve physical, not merely economic, harm. With regard to the second factor, as discussed in detail above, Ford's good faith belief that its conduct was lawful was based on, among other things, its compliance with federal safety standards and industry custom, and significantly lessens any reprehensibility. *See BMW of N. Am., Inc. v. Gore* (1996) 517 U.S. 559, 565, 570-71, 577-78 (defendant's reliance on other state statutes authorizing the conduct at issue was reasonable and substantially mitigated reprehensibility).

With regard to the third factor, plaintiffs do not point to any evidence they were particularly financially vulnerable, or that this contributed to their injuries. Their suggestion that Ford's superior knowledge regarding "design" somehow translates to targeting "financially vulnerable" consumers is nonsensical. *See* RB53. *State Farm*, which involved an insurance bad faith case, makes clear this factor is meant to address circumstances such as fraudulent schemes in which the defendant intentionally preys on the poor or the harm inflicted is directed to the targets' financial helplessness. 538 U.S. at 419 ("State Farm amplified the harm by at first assur-

ing the Campbells their assets would be safe from any verdict and by later telling them, postjudgment, to put a for-sale sign on their house.").

With regard to the fourth factor, plaintiffs invoke their slogan that Ford "put profits ahead of safety" based on its alleged conduct first in the design of the Bronco II and then the Explorer. *See* RB53 (citing RB, section II(D)). But not only is there no substantial evidence of this, it is doubly improper to impose punitive damages here based on any alleged conduct in connection with the Bronco II, which never injured plaintiffs.

Finally, regarding the fifth factor, there is no evidence—and it defies common sense to claim—Ford intended to harm plaintiffs. Plaintiffs' claim that Ford made "deliberate decisions" that harmed plaintiffs relies on the same distortions discussed in Section IV(D), *supra*.

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